Supreme Court, U. S.
FILED
SEP 19 1975
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1975

**No. 75-291**

HERBERT C. KLEIN,
*Petitioner,*

*v.*

KENNETH ROBINSON, *et al.*,
*Respondents.*

**On Petition for Writ of Certiorari to the Supreme Court of New Jersey**

## BRIEF IN OPPOSITION

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## BRIEF IN OPPOSITION

### Counter-Statement of Question Presented

Does it violate the guarantee of a republican form of government found in Article IV, § 4 of the United States Constitution for a state's highest court, based upon a finding that inequalities in expenditures among school districts deprive some students of the "thorough and efficient" education guaranteed by the State Constitution,

to enjoin the distribution of funds pursuant to sections of the State's education laws which aggravate the unconstitutional inequalities in expenditures and to direct that all legislative appropriations for education shall be distributed pursuant to sections of the state's education laws which further the constitutional goal of equality of educational opportunity?

## Counter-Statement of the Case

This case was commenced by the filing of a complaint in the Superior Court of New Jersey, Law Division, in February 1970 which alleged *inter alia* that the present system of financing public education in New Jersey violates various provisions of the United States and New Jersey Constitutions, and sought to enjoin the continued operation of the allegedly unconstitutional statutory scheme.

The court heard testimony between November 1 and 9, 1971, and on January 24, 1972 it issued a lengthy opinion holding that the entire present system of funding public education in New Jersey is unconstitutional. *Robinson* v. *Cahill,* 118 N. J. Super. 223, 287 A. 2d 187 (Law Div. 1972). The court found that school districts with high real property tax bases spent more per pupil than districts with low tax bases (118 N. J. Super. at 235-246, 287 A. 2d at 193-199), that the existing system of state aid for education failed to equalize the capacity of school districts to provide a quality education (118 N. J. Super. at 258-265, 287 A. 2d at 205-209), that the amount of money spent on education does affect the quality of education (118 N. J. Super. at 248-257, 287 A. 2d at 200-205) and that children in school districts with a low real property tax base were receiving an education inferior to



that provided children in wealthier school districts (118 N. J. Super. at 245-252, 287 A. 2d at 198-202). The court therefore concluded that the existing system of financing public schools discriminates against pupils residing in school districts with low real property wealth (118 N. J. Super. at 280, 287 A. 2d at 217). The court held that this discrimination was violative of the Equal Protection Clause of the Fourteenth Amendment and the comparable equal protection guarantees of the New Jersey Constitution. It further held that the inequality of educational opportunity afforded children in districts with low real property tax bases violates the guarantee of the Education Clause of the New Jersey Constitution that the Legislature provide for the maintenance and support of a "thorough and efficient" system of free public schools for all children between the ages of five and eighteen. *N. J. Const.,* Art. VIII, § IV, para. 1.

On appeal, the Supreme Court of New Jersey affirmed the trial court findings that significant disparities exist in expenditures per pupil and that the quality of education depends in substantial measure upon dollar input per pupil. *Robinson* v. *Cahill,* 62 N. J. 473, 481, 303 A. 2d 273, 277 (1973). But it concluded, as had the Court in *Rodriquez* v. *San Antonio Independent School District,* 411 U. S. 1 (1973) that these disparities do not violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, and it also found no violation of the equal protection guarantees of the New Jersey Constitution. 62 N. J. at 482-501, 303 A. 2d at 277-287. On the other hand, the Supreme Court of New Jersey agreed with the trial court that the system of financing public education in New Jersey fails to satisfy the guarantee of a "thorough and efficient" education contained

in the Education Clause of the State Constitution. 62 N. J. at 521, 303 A. 2d at 298. In a supplemental opinion, the court concluded that the existing system should be permitted to continue in operation until July 1, 1975 so that the Legislature could be afforded an opportunity to enact legislation which would satisfy the state constitutional guarantee. *Robinson* v. *Cahill,* 63 N. J. 196, 306 A. 2d 65 (1973).

A petition for writ of certiorari on behalf of the Speaker of the General Assembly and President of the Senate was thereafter filed with the Court, which denied the petition. *Dickey* v. *Robinson,* 414 U. S. 976 (1973).

Although numerous proposals designed to correct the constitutional defect in the State's system for financing public education were placed before the State Legislature, it failed to enact any changes in the system. In the face of this legislative inaction, various parties, including Governor Brendan T. Byrne, filed motions with the Supreme Court of New Jersey for supplemental relief to correct these constitutional defects. Other parties, including the petitioner, filed briefs in opposition to the motion, but none contended that the granting of the requested supplemental relief, including the distribution of legislative appropriations for education in a manner more compatible with the state constitutional requirement, would offend any provision of the United States Constitution.

In an opinion dated May 23, 1975, the court concluded that the enforcement of its original mandate required that it enjoin, effective July 1, 1976, the distribution of state aid for public education in accordance with sections of the education laws providing a fixed amount of aid per pupil, regardless of the real property tax base of the district, and a guarantee of aid at a level not less than that received in a base year, and that it direct the distribution of all state aid in accordance with sections of the law which seek to equalize disparities in the capacity of local districts to fund an adequate program of education. *Robinson* v. *Cahill,* 67 N. J. 333, —— A. 2d —— (1975). In so holding, the court said:



> "The Court has now come face to face with a constitutional exigency involving, on a level of plain, stark and unmistakable reality, the constitutional obligation of the Court to act. Having previously identified a profound violation of constitutional right, based upon default in a legislative obligation imposed by the organic law in the plainest of terms, we have more than once stayed our hand, with appropriate respect for the province of other Branches of government. In final alternative, we must now proceed to enforce the constitutional right involved.
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> • • •
>
> "If then, the right of children to a thorough and efficient system of education is a fundamental right guaranteed by the Constitution, as we have already determined, it follows that the court must afford an appropriate remedy to redress a violation of those rights. To find otherwise would be to say that our Constitution embodies rights in a vacuum, existing only on paper." 67 N. J. at 339-340, 347.

There have been no amendments to the statutes governing the financing of public education since the Supreme Court of New Jersey's decision and thus, in the absence of prompt legislative action, the court's injunctive order will become effective on July 1, 1976.

## ARGUMENT

**There is no basis for granting the petition, because it is firmly established that the administration of state government is not subject to review in the federal courts under the guarantee of a republican form of government of Article IV, § 4 of the Constitution, and in any event, the order of the Supreme Court of New Jersey directing that the appropriations for public education shall be distributed in accordance with statutory provisions which will best discharge the state constitutional guarantee of equality of educational opportunity is fully consistent with well established judicial remedial powers.**

The sole basis for this petition for writ of certiorari is the guarantee of a republican form of government found in Article IV, § 4 of the United States Constitution. Since it is firmly established that a claimed violation of the guarantee of a republican form of government is non-justiciable and the order of the Supreme Court of New Jersey sought to be reviewed is in any event fully consistent with well recognized remedial powers of the state and federal judiciaries, the petition should be denied.

The thesis of the petition is that the Supreme Court of New Jersey intruded upon an exclusive legislative domain by enjoining the distribution of legislative appropriations pursuant to statutory provisions which are inconsistent with the state constitutional guarantee of equality of educational opportunity and by directing that those funds be distributed in accordance with other statutory provisions which more nearly comport with state constitutional requirements, and that the court thereby violated the constitutional guarantee of a republican form



of government. However, it has been firmly established since *Luther* v. *Borden,* 48 U.S. (7 How.) 1 (1849) that a state's governmental structure is not subject to challenge in the federal courts pursuant to this Clause. See also *Ohio ex rel. Bryant* v. *Akron Metropolitan Park Dist.,* 281 U.S. 74 (1930). As stated by Justice Cardozo, speaking for the Court in *Highland Farms Dairy* v. *Agnew,* 300 U.S. 608, 612 (1937), "[h]ow power shall be distributed by a state among its governmental organs is commonly, if not always, a question for the state itself. . . .", and even if there were a possible denial of the guarantee of a republican form of government, ". . . the enforcement of that guarantee, according to the settled doctrine, is for Congress, not the court." Therefore, it is clear that the grounds relied upon in support of the petition are non-justiciable.

Furthermore, even if there were a basis for reconsideration of this settled interpretation of Article IV, § 4, the remedial order entered by the Supreme Court of New Jersey in this matter would not raise a federal constitutional issue. The subject of this petition is simply a remedial order of a court to redress a violation of fundamental constitutional rights. The New Jersey Constitution guarantees to every school age child that "[t]he Legislature shall provide for the maintenance and support of a thorough and efficient system of free public school. . . ." *N. J. Const.,* Art. VIII, § IV, para. 1. The Supreme Court of New Jersey affirmed lower court findings that the State was failing to provide the constitutionally guaranteed level of educational opportunity and that one of the causes of this failure was the distribution of a minimum level of state aid to every school district, including those with a very high local property tax base, while providing insufficient state aid to afford the constitutionally guaranteed level of education in districts with a small

tax base. When the Legislature was unsuccessful over a period of several years in correcting this constitutional deficiency, the Supreme Court of New Jersey was compelled, in its own words, to "'afford an appropriate remedy to redress a violation of those rights. To find otherwise would be to say that our Constitution embodies rights in a vacuum, existing only on paper.'" 67 N. J. 347, A. 2d at . This remedial action, far from being a denial of federal constitutional rights, was thus simply the exercise of what has been, at least since *Marbury* v. *Madison,* 5 U.S. (1 Cranch) 137 (1803), a well recognized judicial power to review the constitutionality of legislative enactments and to provide an appropriate remedy where unconstitutionality is found.

The Court has indicated that the vindication of children's rights under the Equal Protection Clause of the Fourteenth Amendment to receive an education free from the taints of racial discrimination may call for the exercise of extensive remedial powers by the courts. See generally, *Swann* v. *Charlotte-Becklenburg Bd. of Ed.,* 402 U. S. 1 (1971). For example, in *Griffin* v. *County Board of Prince Edward County,* 377 U. S. 218, 233 (1964), the Court indicated that, if necessary to prevent further racial discrimination, the District Court might go so far as to ". . . require the Supervisors to exercise the power that is theirs to levy taxes to raise funds adequate to reopen, operate, and maintain without racial discrimination a public school system in Prince Edward County like that operated in other counties in Virginia." The satisfaction of the guarantee of equality of educational opportunity contained in the Education Clause of the New Jersey Constitution requires a similar breadth of judicial remedial powers and thus even if a claim of a denial of the guarantee of a republican form of government were justiciable, this case would raise no issue under that clause of the Constitution.



## CONCLUSION

**It is respectfully submitted for the foregoing reasons that the Petition for Writ of Certiorari should be denied.**

Respectfully submitted,

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